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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of

12 MATHEW ENTERPRISE, INC., dba STEVENS
13 CREEK CHRYSLER JEEP DODGE AND RAM,

14 Protestant,

15 v.

16 FCA U.S., LLC,

17 Respondent.

**Protest Nos. PR-2484-16, PR-2485-16,
PR-2486-16, and PR-2487-16**

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTESTS**

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1 This matter came on regularly for telephonic hearing on Thursday, February 2, 2017, before
2 Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board ("Board"). Halbert B.
3 Rasmussen, Esq. of Arent Fox LLP represented Protestant. Mark Clouatre, Esq. and Adrienne L. Toon,
4 Esq. of Nelson Mullins Riley & Scarborough, LLP represented Respondent.

5 **PARTIES AND COUNSEL**

6 1. Mathew Enterprise Inc. dba Stevens Creek Chrysler Jeep Dodge and RAM (hereafter
7 "Stevens Creek CJDR" or "Protestant") is located at 4100 Stevens Creek Boulevard, San Jose, California
8 and is a "franchisee" of Respondent as to each of the four line-makes within the meaning of Vehicle Code
9 sections 331.1 and 3060.¹

10 2. The four protests, each alleging a "constructive termination" of a franchise by FCA, were
11 ordered consolidated on December 19, 2016. The protests relate to the following line-makes:

- 12 ■ Chrysler - Protest No. PR-2484-16
- 13 ■ Dodge - Protest No. PR-2485-16
- 14 ■ Jeep - Protest No. PR-2486-16
- 15 ■ RAM - Protest No. PR-2487-16

16 3. Protestant was initially represented by Michael J. Flanagan, Esq. and Torin M. Heenan,
17 Esq., of The Law Offices of Michael J. Flanagan, 2277 Fair Oaks Boulevard, Suite 450, Sacramento,
18 California. Protestant is currently represented by Halbert B. Rasmussen, Esq. and George N. Koumbis,
19 Esq. of Arent Fox LLP, 555 West Fifth Street, 48th Floor, Los Angeles, California.

20 4. Respondent FCA U.S., LLC (hereinafter "FCA" or "Respondent") is a "franchisor" of
21 Protestant as to each line make within the meaning of Sections 331.2 and 3060.

22 5. Respondent is represented by Mark Clouatre, Esq. and Adrienne L. Toon, Esq. of
23 Nelson Mullins Riley & Scarborough LLP, 1400 16th Street, Suite 400, Denver, Colorado and
24 Robert E. Davies, Esq. and Mary A. Stewart, Esq. of Donahue Davies LLP, Post Office Box 277010,
25 Sacramento, California .

26 6. The realty upon which Protestant is situated was formerly owned by Chrysler Group
27

28 ¹ All section citations are to the California Vehicle Code unless otherwise indicated.

1 Realty Company LLC, and is now owned by FCA Realty LLC. (Protests, p. 2, lines 14-15) FCA Realty
2 is alleged to be a wholly-owned subsidiary of FCA, or of FCA's parent (FCA N.V.), or of another entity
3 that shares, either directly or indirectly, common ownership with FCA. (Protests p. 2, lines 19-20)

4 7. FCA Realty is not a party to these protests, and, as FCA Realty is not a "franchisor", the
5 Board has no jurisdiction over it. However Protestant alleges that FCA and FCA Realty are the "alter
6 ego" of each other. Protestant further alleges that "FCA exercises complete control and dominance of the
7 business of FCA Realty, and all major decisions for FCA Realty, including the purchase, sale and lease of
8 properties for [FCA's] dealerships, are made by FCA. (Protests, p. 2, lines 21-25)

9 SUMMARY OF FACTS BEFORE THE BOARD

10 8. FCA has not issued a Notice of Termination pursuant to Section 3060 and maintains that it
11 is not seeking to terminate the franchises of Protestant.

12 9. Protestant is alleging that it is subject to a "constructive termination" of its franchises
13 because of the following:

- 14 (1) FCA has denied Protestant's request that it be permitted to relocate its dealership;
15 (2) Because of this denial, Protestant must remain at its current location;
16 (3) FCA Realty is an alter ego of FCA and is subject to the control of FCA.
17 (4) The lease term for the current location of Protestant has expired;
18 (5) FCA Realty has offered a Proposed New Lease but Protestant has refused to execute the
19 new lease because Protestant believes the terms to be unreasonable;

20 (6) FCA Realty, in accordance with the provisions of the expired lease, is treating Protestant
21 as a hold-over tenant on a month-to-month basis and has increased the rent factor to twice the rent that
22 Protestant had been paying when the lease was in effect.

23 (Protests, p. 2, lines 21-23; p. 3, lines 27-28; p. 4, lines 1-2 and 3-26; p. 5, lines 1-27; p. 6, lines 1-5; p. 7,
24 lines 3-5; p. 9, lines 13-16 and 17-23)

25 10. Protestant alleges that the result of the above will eventually result in termination of the
26 franchises because:

- 27 (1) If Protestant relocates without the consent of FCA, FCA will seek to terminate the
28 franchises. (Protest, p. 8, lines 23-25; Opposition, p. 5, lines 10-12)

1 (2) Alternatively, if Protestant remains at the same location and does not execute the new lease
2 proposed by FCA Realty, FCA “will also terminate the Franchise (*sic*) by causing FCA Realty to
3 terminate Protestant’s right as a tenant to occupy” the current premises, “or by collecting the exorbitant
4 month fee (*sic*) for occupancy of the premises which will force Protestant to give up the Dealer
5 Agreements...” (Opposition, p. 5, lines 13-19)

6 (3) And, alternatively again, if Protestant does execute the Proposed New Lease with its
7 included Facilities Proposal, Protestant’s monthly rent plus the cost of the facilities upgrade “would
8 render Protestant so uncompetitive and unprofitable that it eventually would be forced to cease
9 operations”. (Opposition, p. 5, lines 19-21; p. 3, lines 4-16)

10 ALLEGATIONS OF PROTEST

11 11. At about the time the franchises were first effective (December 2006), Protestant entered
12 into what it believed was a temporary lease agreement² with Chrysler Realty (Old Chrysler Realty as it
13 came to be called) until such time as Chrysler Realty prepared a land sale agreement that would result in
14 Protestant’s owner becoming the owner of the realty. (Protests, p. 2, lines 26-27, p. 3. lines 1-2)

15 12. Old Chrysler Realty’s interest in the property was acquired by FCA Realty in or about June
16 2009, as a result of the bankruptcy of Old Chrysler Realty and its affiliates. (Protests, p. 3, lines 5-6)

17 13. Protestant believed that it had an agreement with Old Chrysler Realty regarding the sale of
18 the realty and that the agreement had been assumed by FCA and FCA Realty, however FCA and FCA
19 Realty reneged on that agreement. (Protests, p. 3, lines 16-19)

20 14. In November, 2010, Protestant brought a civil action against FCA and FCA Realty in
21 Superior Court of California, Santa Clara County, to enforce the claimed agreement for the sale of the
22 realty. This action “was unsuccessful and resulted in a decision in favor of the Respondents on or about
23 November 3, 2015.” (Protests, p 3, lines 20-23) (No further information was provided as to this suit or its
24 outcome.)

25
26 ² The Federal District Court Order (attached as Exhibit A to the protests) discussed below states the lease was a two-year lease
27 that provided “[i]n the event that the Tenant shall remain on the Premises after the expiration...of the term of this Lease...such
28 holding over shall not constitute a renewal or extension of this Lease” and that Defendant could “elect... to treat such holding
over as a... tenancy...on a month-to-month basis...” (Order, p. 2 lines 5-15) As the two-year lease expired in 2008, Protestant
has been a holdover tenant on a month-to-month basis for over 8 years. (Order, p. 3, line 17-19, citing FCA’s letter of
December 2015)

1 15. On about December 21, 2015, Protestant received a letter from FCA Realty notifying
2 Protestant that unless it signed a new lease (Proposed New Lease), FCA Realty “would increase the
3 current rental rate by 200%...”³ (Protests, p. 3, lines 27-28; p. 4, lines 1-2)

4 16. Protestant had several objections to the terms of the Proposed New Lease and declined to
5 sign it. (See pages 4 and 5 of the Protests for the objections.)

6 17. “Prior to January 1, 2016, FCA [had been debiting] Protestant’s account with FCA each
7 month in the total amount of \$69,000 (\$57,000 in ‘base rent’, \$10,300 in real estate taxes and \$1,700 in
8 insurance), purportedly as consideration for Protestant’s occupancy of Protestant’s Current Location.”
9 (Protests, p. 3, lines 24-26)

10 18. Because Protestant declined to sign the Proposed New Lease, “Effective January 1, 2016,
11 FCA has begun to debit Protestant’s account in the total amount of \$138,000 (\$125,000 for ‘base rent’,
12 \$10,300 for real estate taxes and \$1,700 insurance escrow)..., which action has caused Protestant’s annual
13 rent factor to suddenly double from \$828,000 to \$1,656,000.”⁴ (Protests, p. 5, lines 26-27; p. 6, lines 1-2)

14 19. “In a January 27, 2016 letter from its counsel to FCA, Protestant requested FCA’s approval
15 pursuant to Section 11(d)(ii) of the Dealer Agreements to relocate its ... dealership from Protestant’s
16 Current Location to 3566 Stevens Creek Boulevard (‘Proposed Location’), which is owned by
17 Protestant’s owner, Mathew Zaheri, and for Protestant or an affiliate to construct a new facility for the
18 dealership at that location (‘Protestant’s Relocation and Facility Proposal’).” (Protests, p. 6, lines 6-10)

19 20. “The Proposed Location is approximately 0.6 miles from Protestant’s Current Location,
20 and like the Protestant’s Current Location, is on the Stevens Creek Boulevard auto row.” (Protests, p. 6,
21 lines 11-12)

22 21. On February 5, 2016, FCA rejected the relocation proposal, in part, on the ground that
23 Protestant had not provided “any details about the proposed relocation” and indicating that FCA would
24

25 ³ This statement made here and elsewhere re: increasing the rental “by 200%” is apparently inaccurate as the expired rental
26 agreement stated that the rental could be increased to “an amount equal to 200% of the rental set forth” in the lease. (Order, p.
27 2, lines 16-17) Increasing the rent “by 200%” would mean that the rent could be tripled (increasing the rent “by 100%” would
28 be doubling). As stated in the old lease, increasing the rent factor to “an amount equal to 200% of the rental” would be
doubling the rent. In this case, the base rental factor was doubled, thus it was in fact a 100% increase (or “an amount equal to
200%”) of the original rent.

⁴ See prior footnote.

1 “reject the proposal even after details were provided.” (Protests, p. 6, lines 22-25)

2 22. On February 23, 2016, Protestant responded to FCA’s rejection “with a detailed letter by
3 its counsel and documentation which provided FCA with the ‘details about the proposed relocation’”.
4 Protests, p. 6, lines 26-27; p. 7, lines 1-2)

5 23. On March 29, 2016, FCA rejected the request for relocation. (See pages 7 and 8 of the
6 Protests for alleged reasons for the rejection.)

7 24. The Protestant makes the following assertions in support of its claim for relief before the
8 Board:

9 “41. Upon information and belief, if Protestant were to implement the Protestant’s Relocation
10 and Facility Proposal without Respondent’s prior written approval, Respondent would terminate the
11 Dealership Agreements.” (Protests, p. 8, lines 23-15) (It is noted that this is stated to be “Upon
12 information and belief” and relates to what Protestant believes FCA would do in the future if Protestant
13 relocated without approval of FCA.)

14 “42. Upon information and belief, if Protestant remains at Protestant’s Current Location and
15 does not accept Respondent’s Facility Proposal⁵ [as part of the Proposed New Lease], Respondent will
16 also terminate the Franchise[s] either directly or indirectly by causing FCA Realty to terminate
17 Protestant’s rights as a tenant to occupy Protestant’s Current Location, which is the only currently
18 authorized location at which Protestant can conduct [the franchise] operations under the Dealer
19 Agreements.” (Protests, p. 8, lines 26-28; p. 9, lines 1-2) (It is noted that this too is based upon
20 Protestant’s “information and belief” as to what FCA Realty would do and then what FCA would do at
21 some time in the future.)

22 “43. Even if Protestant remains at the Protestant’s Current Location without accepting
23 Respondent’s Facility Proposal and Respondent does not directly or indirectly terminate the Franchise[s],
24 Protestant will ultimately be forced to give up the Dealer Agreements and go out of business without an
25 affordable upgrade of its dealership facility.” (Protests, p. 9, lines 3-6) (This too is a prediction of what
26

27 ⁵ Although this is referred to as “Respondent’s [FCA’s] Facility Proposal”, the Protest elsewhere states that this was contained
28 in FCA Realty’s Proposed New Lease and that it was “FCA Realty [that] would have the right, but not the obligation, to
construct new dealership facilities at Protestant’s Current Location at a cost not to exceed \$14,000,000 (‘Respondent’s Facility
Proposal’).” (Protests p. 4, lines 7-9)

1 may occur at some time in the future and not only does it not allege an intention of FCA to terminate the
2 franchises, but states what may occur even if FCA “does not directly or indirectly terminate the
3 Franchise[s]”).)

4 “44. On June 24, 2016, Protestant filed a [civil action] against Respondent in the United States
5 District Court, Northern District of California alleging, in part, Protestant (*sic*) is acting in violation of
6 Cal. Veh. Code § 3060.” (Protests, p. 9, lines 7-9)

7 “45. On November 16, 2016, the District Court dismissed Protestant’s claims, including its
8 claim under the Cal. Veh. Code because Protestant had not exhausted its administrative remedies by first
9 bring (*sic*) the matter to the California New Motor Vehicle Board.” (See Exhibit A attached to the
10 Protests; Protests, p. 9, lines 10-12)

11 25. Protestant filed these protests on November 22, 2016.

12 26. The vast majority of the 10 pages of each Protest are assertions regarding the dispute as to
13 whether FCA was reasonable in denying Protestant’s request to relocate and the reasonableness of the
14 terms of the Proposed New Lease as submitted to Protestant by FCA Realty. As will be discussed, the
15 Board has no jurisdiction to resolve these issues.

16 **UNITED STATES DISTRICT COURT ORDER GRANTING**
17 **DEFENDANT’S [FCA’S] MOTION TO DISMISS THE CIVIL ACTION**
FILED BY MATHEW ENTERPRISE, INC.

18 27. Mathew Enterprise, Inc., the Protestant before the Board, is the Plaintiff in the Federal
19 Court action, and FCA US, LLC, the Respondent before the Board, is the Defendant in the Federal Court
20 action.

21 28. Plaintiff’s suit against FCA included three claims:

22 (1) Violation of the Automobile Dealer’s Day in Court Act (ADDCA) “[b]y refusing to
23 approve Plaintiff’s [relocation proposal] for alleged reasons that are without merit and pre-textual in order
24 to coerce Plaintiff to accept Defendant’s Facility Proposal and incur a rent factor that will eventually force
25 Plaintiff to give up the Franchise.” (Order, p. 6, lines 4-8);

26 (2) Breach of the implied covenant of good faith and fair dealing by “refusing to approve
27 Plaintiff’s Relocation and Facility Proposal for alleged reasons that are without merit and pre-textual.”
28 (Order, p. 6, lines 8-11)

1 (3) Violation of Section 3060, “by constructively terminating Plaintiff’s franchise without
2 providing Plaintiff notice and without a finding of good cause.” (Order, p. 6, lines 12-14)

3 29. The Court granted FCA’s Motion to Dismiss as to all three of the causes of action.

4 30. As to Count One, the alleged violation by FCA of the ADDCA, the Court concluded: “[i]n
5 sum, Plaintiff has no right ‘to the location of its own choosing,’ (citation omitted), and Defendant’s
6 ‘denial of [Plaintiff’s] relocation request’ does not amount to coercion or intimidation within the meaning
7 of the ADDCA. (Citation omitted.) Accordingly, because Plaintiff has failed to allege that Defendant
8 acted in bad faith within the meaning of the ADDCA, Count One fails to state a claim for relief under the
9 statute. (Citation omitted.) (‘[U]nless the transactions between the parties involves coercion or
10 intimidation, or threats of coercion or intimidation,’ the manufacturer has not violated the ADDCA);
11 (Citation omitted) (‘To show that [the manufacturer] failed to act in ‘good faith’ [the dealer] had to prove
12 that [the manufacturer’s] conduct amounted to coercion and that as the result of intimidation or threats,
13 [the dealer] was forced to act or refrain from acting and that it suffered damage.’)” (Order, p. 11, lines
14 14-26)

15 31. The Court’s dismissal of this Count was without prejudice, meaning that Plaintiff was
16 granted leave to amend its pleadings as to Count One.

17 32. As to Count Two of Plaintiff’s complaint that alleged Defendant violated the implied
18 covenant of good faith and fair dealing in refusing to approve Plaintiff’s relocation proposal, the Court
19 applied Michigan law and concluded: Under Michigan law, there is no general implied duty of good faith
20 and fair dealing, however such a duty could arise if “a party to a contract makes the manner of its
21 performance a matter of its own discretion”. (Citations omitted.) (Order, page 12, lines 16-28) “By
22 contrast, ‘Michigan law does not imply the good faith covenant when parties have unmistakably
23 expressed their respective rights.’ (Citations omitted.) (Order, p. 13, lines 4-5; emphasis added)
24 “Accordingly, under... cases applying Michigan law, §11(d)(ii) of the Sales Agreement ‘presume[s] no
25 discretion and, thereby, remove[s] any basis upon which to imply a covenant of good faith and fair
26 dealing.’” (Citations omitted.) (Order, p. 14, lines 23-27)

27 33. As the Court found that Plaintiff’s claim under Count Two was barred as a matter of
28 Michigan law, the claim under Count Two was dismissed with prejudice, meaning Plaintiff was denied

1 the right to amend its pleading as to Count Two (the claim that FCA was in breach of an implied covenant
2 of good faith and fair dealing).

3 34. Count Three of Plaintiff's complaint alleged "that Defendant violated California Vehicle
4 Code § 3060 by 'constructive[ly] terminat[ing]' Plaintiff's franchises without providing 'written notice'
5 and without a finding by the California New Motor Vehicle Board ('CNMVB') of 'good cause for
6 termination,' as required by § 3060." (Order, p. 15, lines 14-20)

7 35. The Court states: "**Defendant asserts** that Plaintiff has failed to state a claim for violation
8 of California Vehicle Code §3060 because **a violation of § 3060 'falls within the jurisdiction of the**
9 **ICNMVB]**,' and Plaintiff has failed to exhaust its administrative remedies. Def. Mot. at 18.⁶ As
10 discussed below, the Court agrees with Defendant." (Order, p. 16, lines 8-12; emphasis added) (It is
11 noted that here and in the prior paragraph, the assertion is that FCA has "violated" Section 3060 by
12 constructively terminating the franchises without providing notice and that the Court agreed with FCA
13 that Plaintiff must first proceed before the Board to seek a remedy. It appears that the assertion in Federal
14 Court was merely that FCA "violated" the provisions of the Vehicle Code and Plaintiff was not asking the
15 Court to decide whether there was good cause for the "constructive termination" that allegedly had
16 already occurred.)

17 36. The Court then states, "California courts have explained that '[i]t is settled that 'when an
18 administrative remedy is provided by statute, relief must be sought from the administrative body and this
19 _____

20 ⁶ The Board has not been provided with a copy of Protestant's Complaint or FCA's Motion to Dismiss filed in Federal Court.
21 However, it appears that in Federal Court FCA is asserting that Count Three should be dismissed as Plaintiff must first proceed
22 before the Board. Now, before the Board, FCA is inconsistently asserting that Plaintiff has no right to any remedy before the
23 Board because the Board has no jurisdiction over the dispute between the parties and the dispute should be resolved in the
24 courts. Had the protests been filed prior to the federal civil action, it is likely that FCA would have been asserting that the
25 proper forum is either state or federal court. But when the civil suit was brought in federal court, FCA asserted that Plaintiff
26 should be before the Board. Generally, when a party asserts the failure to exhaust administrative remedies (and prevails on that
27 claim) there is or was in fact and law such a remedy even though a defense such as a failure to assert the administrative claim
28 within the allowed time bars the administrative remedy. Here, FCA is not asserting a defense to the asserted administrative
claim but rather FCA is now asserting there never was a basis for the administrative claim as the Board is without jurisdiction
to proceed on the claim. This matter may return to Federal Court with nothing having been accomplished other than the
expenditure of time and money by Protestant and FCA and the unnecessary burden upon the resources of the Federal Court and
the Board. It would likely have been more efficacious for FCA to assert in Federal Court as it is doing now before the Board
that there could be no "violation" of Section 3060 for the reasons stated in FCA's Motion to Dismiss Protests. As FCA is not
intending to terminate Protestant, there is no violation of Section 3060 and the Board is without jurisdiction to grant any relief.
Accordingly, based upon FCA's current contentions, it is possible that Count Three should have been dismissed not because of
the failure to exhaust administrative remedies but because, as a matter of law, there could be no violation of Section 3060 as
FCA is not intending a termination of the franchises.

1 remedy exhausted before the courts will act.” (Citations omitted.) (Order, p. 16, lines 17-19) Although
2 this is in general an accurate statement, it contains a qualifier that FCA is now asserting makes the
3 statement inapplicable. The qualifying language which makes the statement inapplicable is “where an
4 administrative remedy is provided by statute...”. As FCA is correct in its assertion now that the Board is
5 without jurisdiction to hear the protests filed, then there is not now and never has been an “administrative
6 remedy ... provided by statute”.

7 37. Thus, in addition to the fact that Plaintiff was alleging a “violation” and that the
8 “constructive termination” had already occurred, FCA’s contention in federal court that Plaintiff must first
9 proceed before the Board to seek a remedy (that FCA now says is non-existent) may not have been well
10 taken.

11 38. The Court points out that “Plaintiff’s complaint contains no allegations that it exhausted its
12 administrative remedies with the CNMVB prior to seeking relief in this Court.” (Order, p. 16, line 27, p.
13 17, line 1)

14 39. The Court granted FCA’s motion to dismiss Count Three and stated, “[h]owever, leave to
15 amend is granted so that Plaintiff can allege facts that demonstrates that Plaintiff appropriately exhausted
16 its administrative remedies.” (Order, p. 17, lines 18-20) Of course, as FCA is now urging, there are no
17 administrative remedies to exhaust.

18 **FCA’S MOTION TO DISMISS THE PROTESTS BEFORE THE BOARD**

19 40. Initially, FCA asserts that the Protests should be dismissed because, “FCA has not and is
20 not currently pursuing any termination measures against Protestant. As no such notice has been issued by
21 FCA or received by the Board, the Board lacks jurisdiction to proceed with the Protests and the Protests
22 should be dismissed with prejudice.” (Motion, p. 3, lines 15-18; emphasis added)

23 41. FCA’s contention in the second sentence here, that the Board lacks jurisdiction “As no
24 such notice [of termination] has been issued by FCA or received by the Board...” is puzzling. FCA in its
25 Reply states, “[i]n *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.*, it was found that
26 although the motor vehicle distributor did not issue a proper termination notice to the dealer under Cal.
27 Veh. Code § 3060, the Board had jurisdiction over the termination protest at issue.” (Reply, p. 3, lines 8-
28 15) The above underlined statement of FCA is interpreted to mean only that the lack of a written notice

1 of termination issued in compliance with Section 3060 is merely an indicator that FCA does not intend to
2 terminate Protestant's franchises rather than its literal statement that a notice of termination is required for
3 the Board to have "jurisdiction".

4 42. FCA also alleges that Protestant's claim that FCA's rejection of Protestant's relocation
5 proposal constitutes "constructive termination" "does not bring this purported dispute within the purview
6 of the Board's jurisdiction." (Motion, p. 3, lines 19-21) Additionally, "the proper forum for alleged
7 constructive or de facto termination is civil litigation before a court of competent jurisdiction." (Citations
8 omitted.) (Motion p. 3, lines 22-25)

9 ANALYSIS

10 43. The dispute between FCA and Protestant is solely based upon the refusal of FCA to
11 consent to the request of Protestant to relocate. If FCA permits Protestant to relocate, there will no longer
12 be a basis for a claim of "constructive termination" and the issues regarding the lease with FCA Realty
13 would cease to exist.

14 44. The claim of "constructive termination" of Protestant's franchises is based upon the
15 inability of Protestant to relocate and being required to remain on the current premises, with or without a
16 new lease, and the asserted future financial consequences that would flow from these circumstances.

17 45. However, neither the primary dispute regarding the denial by FCA of the request to
18 relocate nor the subsidiary disputes resulting from the expiration of the lease with FCA Realty are within
19 the jurisdiction of the Board as created by Section 3050(d) and Section 3060 (even if FCA Realty is
20 controlled by and is the alter ego of FCA).

21 46. FCA is contending that it does not intend to terminate the franchises of Protestant. It is
22 undisputed that Protestant's dealership is operating in its usual course and that FCA is continuing to
23 transact business with Protestant with no threat of cessation by FCA. To allow the protests to proceed to a
24 hearing on the issue of whether there is good cause to terminate the franchises, with the burden to prove
25 good cause to terminate assigned to FCA would result in the anomaly of FCA being required to prove
26 good cause to do that which it is not doing, that is terminating the franchises.

27 47. The assertions that FCA violated Section 3060 by failing to provide the notices described
28 in Section 3060 when the claim is one of "constructive termination" raises interesting issues. Should

1 FCA, that is denying any intent to terminate the franchises, be required to provide notices of intent do that
2 which it is contending it is not doing? And, if notices of “constructive termination” must be given, would
3 the claimed “termination” still be “constructive”? How would any such notices be worded? For example
4 should they say, “FCA has disapproved your request to relocate. Remaining on the premises may result in
5 the ‘constructive termination’ of your franchise as the increased rent due to FCA Realty may make your
6 ability to remain in operation as a franchisee more difficult. If you wish to protest the possible
7 constructive termination of your franchise due to being required to remain on the current premises you...”

8 48. Setting aside what the allegedly required notice may say, more relevant and realistic would
9 be the issues that would be addressed at a hearing on the merits of a protest under these circumstances.
10 Rather than addressing the issue of good cause for a potential future “constructive termination” of the
11 franchises by FCA, any hearing on the merits of the protests would focus upon what Protestant is stating
12 to be the cause of the “constructive termination”, which is the refusal of FCA to approve the request to
13 relocate. Instead of the issue at the hearing on the merits of a “termination protest” being the statutorily
14 mandated issue of whether there is good cause to terminate the franchises, the issues at the hearing under
15 these alleged facts would be (a) whether FCA was reasonable in refusing to approve the request for
16 relocation; (b) whether the Proposed New Lease as submitted by FCA Realty, with its included Facilities
17 Construction provisions, was reasonable and must be assented to by Protestant or face loss of its tenancy;
18 and (c) if Protestant refused to execute the Proposed New Lease, whether FCA Realty should be permitted
19 to terminate what is now a month-to-month tenancy of Protestant which includes a rental factor of twice
20 what the rent had been under the terms of the original lease that expired in 2008. None of the statutorily
21 created powers of the Board include the power to address and resolve these issues.

22 49. Based upon the claims of Protestant, a “constructive termination” will result at some time
23 in the future “from FCA’s economic duress of Protestant by wrongfully compelling Protestant to remain
24 at Protestant’s Current Location and to either attempt to compete with an antiquated and uncompetitive
25 dealership facility or incur a ruinous rent factor by being forced to accept Respondent’s Facility Proposal.
26 Under either scenario, Protestant will become insolvent and forced to surrender its [franchises] against its
27 will.” (Protests, p. 9, lines 17-21)

28 50. Given these allegations and likely issues, if the protests went to hearing, what should or

1 could be the scope of any order from the Board regarding the lease?

2 51. The relief asked for in the protests is “[t]hat the Board sustain this protest and order
3 Respondent not to terminate Protestant’s FCA franchise, as alleged herein, nor refuse to continue its
4 existing franchise.” Additionally, the Protests ask “[t]hat pending the hearing in this matter, the Board ...
5 immediately order Respondent not to terminate or refuse to continue Protestant’s franchise until such time
6 as Respondent has established good cause for such actions under the provisions of Vehicle Code Section
7 3060 and 3061.” (Protests, p. 10, lines 19-24)

8 52. For the Board to issue an order that “Respondent not terminate” the franchises would be
9 meaningless unless the order included additional protection to Protestant by way of mandate or
10 prohibition to either FCA or FCA Realty or both. The Board would have to make findings relating to and
11 include in its order the following:

12 (1) That FCA unreasonably withheld its consent to the relocation request and order that FCA
13 approve the relocation, or that Protestant may relocate without FCA’s approval; or,

14 (2) That Protestant was justified in declining to execute the Proposed New Lease because its
15 terms were unreasonable and order FCA Realty (or both FCA Realty and FCA) to allow Protestant to
16 remain on the premises (with some impossible to ascertain “reasonable terms” of the new or continuing
17 tenancy of Protestant). And, the Order may have to address whether the Facilities Construction Proposal
18 of FCA Realty along with its increase in rental rate was or was not reasonable.

19 53. If the Board found that FCA was not unreasonable in denying the request to relocate,
20 Protestant would face the same financial consequences as Protestant is alleging will occur if FCA were
21 found to be “wrongfully” compelling Protestant to remain at its current premises.

22 54. And if the Board found that FCA was not unreasonable in refusing to approve the
23 relocation, would the Board be required to address whether FCA had good cause to allow the alleged
24 constructive termination to occur? Or would the finding by the Board that FCA was not unreasonable in
25 denying the request to relocate mean automatically that FCA is also permitted to allow the constructive
26 termination to occur?

27 55. Alternatively, if after the Board conducted a hearing on the protests and if the Board
28 concluded that FCA was unreasonable in denying the request to relocate, what sort of order could the

1 Board issue? No one is contending that the Board could issue an order that required FCA to approve the
2 relocation request. In fact, during the hearing before the ALJ on FCA's Motion to Dismiss Protests,
3 counsel conceded that the Board had no jurisdiction to act upon whether FCA was reasonable or
4 unreasonable in withholding its consent to the relocation request. (Reporters Transcript., pp. 15-18) The
5 most the Board could order would be that FCA may not terminate the franchises, which is exactly what
6 FCA is stating is its position currently. Such an order would be doing nothing more than restating what is
7 already prohibited by statute with no need for the filing of a protest. For the Board to issue an order
8 sustaining the protests and have it effective to prevent the "constructive termination" from occurring, as
9 stated above, the Board's order would have to include that "FCA must approve the relocation request", an
10 order not within the Board's powers to issue.

11 56. There would be similar problems as to the subsidiary issues regarding the lease of the
12 premises. Protestant is alleging that a constructive termination will occur if it does not sign a new lease
13 (as FCA Realty will likely require Protestant to vacate the premises), or a constructive termination will
14 occur if the Proposed New Lease is signed because of the allegedly exorbitant rental payments that would
15 be required.

16 57. As above, for the Board to issue an order merely sustaining the protests and directing FCA
17 not to terminate the franchises would be doing nothing more than what is already prohibited by statute. In
18 order to effectively grant Protestant the relief it seeks from the alleged "constructive termination" the
19 Board's order would have to include some mandate or prohibition regarding what FCA Realty can or
20 cannot do under the expired lease or what must or must not be contained in the terms of the Proposed
21 New Lease with FCA Realty. None of these are within the powers granted to the Board by the legislature.

22 58. In sum, the dispute between Protestant and FCA is whether FCA was and is reasonable in
23 not granting approval to Protestant to relocate. And, the dispute between Protestant and FCA Realty is a
24 dispute regarding the rights of FCA Realty as a result of the expiration of the term of the old lease and
25 what may or may not be reasonable as to the terms of the Proposed New Lease.

26 59. The Board has no jurisdiction over FCA Realty, and FCA Realty is not a party to the
27 protests. Even if FCA Realty and FCA are treated as the same entity (with FCA Realty being an "alter
28 ego" of FCA), the Board has no jurisdiction over the dispute regarding the leases. The allegation of a

1 party that the failure to resolve the disputes in favor of that party will result in a "constructive
2 termination" of the franchises at some time in the future, does not create jurisdiction in the Board if the
3 jurisdiction does not exist in the statutes. Characterizations of, or predictions of what may be the result of,
4 the disputes do not convert the disputes into what is necessary for there to be jurisdiction in the Board,
5 which is that there is a present intent of FCA to terminate the franchises.

6 60. As to the lack of notices and the right to protest, whether or not FCA provides the
7 statutorily required notices of termination to Protestant and the Board is irrelevant to the right to a hearing
8 before the Board if the intended action of the franchisor is within the scope of the Board's powers. If there
9 is jurisdiction in the Board, as stated by the Federal Court, "California courts have held that '[l]ack of
10 notice does not prevent the [CNMVB] from exercising its powers to resolve disputes between franchisors
11 and franchisees." Citing *Yamaha Motor Corp.*, 185 Cal. App. 3d at 1239-40 (Court Order, p. 17, lines 7-
12 10) Of course this assumes that the Board has such "power" to exercise.

13 **PROPOSED ORDER**

14 After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered
15 that Respondent's Motion to Dismiss Protests is granted. Protest Nos. PR-2484-16, PR-2485-16, PR-
16 2486-16, and PR-2487-16 (*Mathew Enterprises, Inc., dba Stevens Creek Chrysler Jeep Dodge and Ram v.*
17 *FCA U.S. LLC*) are dismissed without prejudice.

18
19 I hereby submit the foregoing which constitutes my
20 proposed order in the above-entitled matters, as the
21 result of a hearing before me, and I recommend this
22 proposed order be adopted as the decision of the New
23 Motor Vehicle Board.

24 DATED: March 1, 2017

25 By 
26 ANTHONY M. SKROCKI
27 Administrative Law Judge

28 Jean Shiimoto, Director, DMV
Coleen Solomon, Acting Branch Chief
Occupational Licensing, DMV